

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 170 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

GORDHAN JIVABHAI CHAUHAN

Appearance:

MR.S.R.DIVETIA, APP, for the appellant-State.

MR DHRUV C DALAL, Advocate, for the Respondents.

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 08/07/96

ORAL JUDGEMENT (per KADRI, J.)

Appellant State of Gujarat has filed this appeal challenging the validity of the judgment and order dated 29.9.1984, passed by the learned Addl. Sessions Judge, Kheda at Nadiad, in Sessions Case No. 96 of 1984, whereby the learned Sessions Judge acquitted the respondents-accused of the charges framed against them for the offence punishable under S.302 read with S.114 of the Indian Penal Code, and also of the charge framed against them for the offence punishable under S.324 read with S.34 of the I.P.Code.

2. It may be stated that the State of Gujarat had challenged the judgment and order dated 29.9.1984 of the learned Addl. Sessions Judge, in this High Court by filing Criminal Appeal No. 170 of 1985, which came to be placed for admission hearing before the Division Bench. The Division Bench dismissed the said appeal by order dated 4.9.1995. Against the order of the Division Bench of this Court dismissing the appeal at the admission stage, State of Gujarat preferred Criminal Appeal No. 58 of 1987 in the Hon'ble Supreme Court of India. In the said appeal, by the order dated 19.3.1996, the Hon'ble Supreme Court was pleased to remand the present Appeal No. 170 of 1985 to this court with a direction to grant leave and hear the appeal on merit. In view of this direction of the Hon'ble Supreme Court, Criminal Appeal No.170 of 1985 was admitted by the High Court on 25.4.1996. Bailable warrants were issued against the four accused, and were sent for service to the Sessions Court, Kheda at Nadiad. A report was submitted by the learned Sessions Judge at Nadiad that respondent no.1, i.e. original accused no.1 Gordhan Jivabhai Chauhan had expired on 22.5.1995, that is, during the pendency of the appeal. The learned Sessions Judge, alongwith this report, submitted a xerox copy of the death certificate of Gordhan Jivabhai Chauhan, which shows that accused no.1 expired on 22.5.1995 at Village Mitral. The fact that accused no.1 expired on 22.5.1995 is not disputed by

the appellant State of Gujarat. Accordingly, in view of the provisions of S.394 of the Code of Criminal Procedure, 1973, the appeal has abated against accused No.1 Gordhan Jivabhai Chauhan. Therefore, the appeal stands disposed of as abated against original accused no.1.

3. The prosecution case in brief is as under:

Complainant Fatesing Bhikhabhai of Village Piplata was married to the daughter of Gandabhai Bhathibhai of Village Mitral. Gandabhai Bhathibhai and Becharbhai Chuthabhai were married to two sisters and therefore, they were 'sadubhais'. Becharbhai Chuthabhai had one son Kantibhai Becharbhai, who happened to be a close friend of complainant Fatesing. Complainant Fatesing had come to Village Mitral, and had put up at the house of Kantibhai Becharbhai. On the day of the incident, i.e. April 2, 1984, Fatesing and Kantibhai had gone to the field known as Motiawala, bearing Survey No.555/3 situated at the outskirts of Village Mitral. Around 12.00 noon they had an urge of going to answer call of nature and therefore, both of them had gone to the nearby vicinity for the said purpose. According to the say of the complainant, when he and Kantibhai were returning to the field called Motiawala, all the four accused, viz. Gordhanbhai Jivabhai Chauhan, Kantibhai Jivabhai Chauhan, Mafatbhai Jivabhai Chauhan and Udesing Jivabhai Chauhan, were standing in the field armed with spades and dharias. When Kantibhai Becharbhai asked them as to why they had entered the field, accused no.2 gave a spade blow on the head of Kantibhai Becharbhai due to which he fell down. Thereafter, the other accused inflicted blows by means of spade and dharias on the person of Kantibhai. Thereupon complainant Fatesing intervened and tried to rescue Kantibhai, and at that time, accused no.4 gave a blow with dharia on his head. When accused no.2 Kantibhai Jivabhai tried to give blow by means of a spade to the complainant, he snatched away the spade and wielded it against the accused. As per the say of the complainant, after Kantibhai Becharbhai fell down, he raised shouts. One Raijibhai Shanker who was passing from near the field heard the same and came there. It is prosecution case that other persons had also gathered at the place where Kantibhai had fallen down. On seeing the other persons gathered there, all the four accused ran away with two dharias and one spade with them. As Kantibhai was seriously injured, he was taken to Vaso hospital in a tractor alongwith complainant Fatesing, who had also sustained injuries on his head. After taking preliminary treatment at the Vaso Hospital, complainant went to Vaso Police Station to lodge his complaint. The complaint was

lodged at the Vaso Police Station at 3.45 P.M. Police Sub Inspector Mr. Sharad Nimbamali, who was in charge of the Vaso Police Station recorded the complaint of Fatesing and started investigation. As Kantibhai was seriously injured, and his condition was critical, he was removed to Ahmedabad Civil Hospital, where he was declared dead at 8.30 p.m. After preparing the inquest report, the dead body of Kantibhai was sent for post mortem examination. On the next day, i.e. on 3.4.1984, PSI Mr. Nimbamali, had visited Motiawala field, and had drawn the panchnama of the scene of offence, and prepared a map showing the exact position of the place of incident and the surrounding area. Statements of witnesses were recorded. After completing investigation, charge-sheet came to be filed against the four accused in the court of the learned Judicial Magistrate, First Class at Nadiad. As the offences involved in the charge-sheet were exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions.

4. Charge Exh.3 was framed by the learned Addl. Sessions Judge, Nadiad, against the accused. The accused pleaded not guilty to the charge, and claimed to be tried.

5. In order to prove its case, the prosecution examined following witnesses :

- (i) PW 1 Ex.10: Dr. Rajendraprasad Purani,
- (ii) PW 2 Ex.20: Ravji Jivabhai Patel,
- (iii) PW 3 Ex.22: Gordhanbhai Kalabhai,
(Panch witness)
- (iv) PW 4 Ex.26: Dr. Ravindra Bhise (who had performed postmortem on the body of deceased Kantibhai)
- (v) PW 5 Ex.29: Complainant Fatesing Bhikhabhai
- (vi) PW 6 Ex.30: Punanand Bhikhatal, Police Head Constable.
- (vii) PW 7 Ex.31: Raijibhai Shankerbhai.
- (viii) PW 8 Ex.32: Becharbhai Chuthabhai (father of deceased Kantibhai)
- (ix) PW 9 Ex.33: Gandabhai Bhathibhai (father-in-law of complainant Fatesing)
- (x) PW10 Ex.34: Investigating Officer, PSI Sharad Nimbamali.

The prosecution also produced documentary evidence consisting of post-mortem notes of deceased Kantibhai, injury certificate of complainant Fatesing, map and panchnama of the scene of offence, report from the Forensic Science Laboratory, etc. The learned Addl.

Sessions Judge, after appreciating the oral as well as documentary evidence on record, came to the conclusion that the prosecution has failed to prove its case against the accused, and accordingly acquitted them on the following grounds :

- (a) that no details were given in the FIR about the manner in which the incident had taken place;
- (b) that the complainant did not know the reasons of assault by the four accused, and therefore, the motive was not proved;
- (c) that in the FIR it was not stated as to how many blows were inflicted by each of the accused by means of spades and dharias on deceased Kantibhai;
- (d) that the FIR did not disclose the names of the witnesses who came at the place of the incident after complainant Fatesing raised shouts;
- (e) that all the witnesses examined by the prosecution were related to each other and were inimical to the accused;
- (f) that the conduct of the complainant was unnatural as he did not raise shouts when the deceased was first attacked by the accused persons with spade;
- (g) that in the FIR, snatching away of spade by the complainant and wielding the same was not mentioned;
- (h) that in the FIR the fact that persons from the neighbouring area had gathered at the place of the incident was also not mentioned;
- (i) that in the FIR it was not mentioned that accused no.3 had a dharia with him and he gave dharia blow to Kantibhai;
- (j) that in the FIR, the fact that witness Raiji Shanker had arrived first in point of time, was also not stated;

The learned Judge also held that eye-witness Raiji Shanker, PW 7, exh.31 was a chance witness, and his oral evidence was contrary to the evidence of complainant Fatesing because according to the complainant, blows were given to the deceased with the sharp edge of the spade,

whereas eye-witness Raiji Shanker has stated that blows were given with the blunt portion of the spade. The learned Judge has observed that Investigating Officer had recorded the statement of witness Raiji Shanker on the next day morning, and inspite of that, he had not disclosed that at the scene of offence Harmanbhai Becharbhai, Becharbhai Chuthabhai and Gandabhai Bhathibhai had also arrived. It is further held that it is surprising to note that Raiji Shanker did not chase the accused when he arrived at the place of incident. The learned Sessions Judge also discarded the evidence of Becharbhai Chuthabhai and Gandabhai Bhathibhai on the ground that they were highly interested witnesses and were inimical to the accused. As Becharbhai Chuthabhai, PW 8 - Ex.32 during his cross-examination admitted that when injured Kantibhai Becharbhai was taken in a trolley to Vaso Hospital, they were discussing as to who were the persons who might be the assailants. The learned Judge noted that Becharbhai Chuthabhai stated in the examination-in-chief that he had seen the accused running away after causing injuries to Kantibhai and complainant Fatesing whereas in cross-examination he deposed that on way to Vaso Hospital, they had a discussion as to who could be assailants and this clearly destroys the prosecution case that the four accused were the assailants and had inflicted fatal blows to Kantibhai Becharbhai, and also caused injuries on the head of complainant Fatesing. The learned Judge has noticed the fact that he was a mortgagor of a field bearing Survey No. 511/2 belonging to Jivabhai Bhikhabhai, the father of the accused and was not on good terms.

6. The learned Sessions Judge also discarded the evidence of Gandabhai Bhathibhai, PW 9, exh.33 who happens to be the father-in-law of complainant Fatesing Bhikhabhai for following reasons :

This witness is the owner of Motiawala field where the incident had taken place. He deposed that he had bought this field from one Jayabhai Lakhabhai. In cross-examination, he was confronted with the question that the disputed field did not belong to him but in fact, it belongs to Jivabhai Bhikhabhai, the father of the accused. It is pertinent to note that there is a civil litigation pending with regard to the disputed field between the father of the accused and Jayabhai Lakhabhai and others. The accused had produced certified copy of the judgment rendered in Civil Suit No.164/83 during their further statement under S.313 of the Code of Criminal Procedure. By the above judgment, the father of the accused was held to be the owner of the field bearing

7. Becharbhai Chuthabhai, PW 8, Exh.32 who is the Sarpanch of Village Mitral since last 15 to 20 years, is disbelieved because he is a man in power and he as well as Gandabhai Bhathibhai were the mortgagors of different pieces of agricultural lands belonging to Jivabhai Bhikhabhai, the father of the accused and had thwarted attempts by Jivabhai to redeem the said agricultural lands from the mortgagors. According to the learned Judge this indicates that both the aforesaid witnesses had a grudge against Jivabhai and the evidence of both the witnesses is not only highly interested, but suffers from the vice of improvements.

8. The 1d. Addl. Sessions Judge, after carefully scrutinising the evidence of the above four witnesses, viz. Complainant Fatesing, Raiji Shanker, Becharbhai Chuthabhai and Gandabhai Bhathibhai, came to the conclusion that the prosecution case is highly doubtful, and the four accused were wrongly roped in the case. The learned Judge had also acquitted the accused of the charged framed against them on the ground that the FIR was filed late, because the incident had taken place at 12.0 noon, whereas the FIR was lodged at 3.45 p.m. at Vaso Police Station.

9. The learned APP Mr.S.R.Divetia appearing for the appellant State of Gujarat has vehemently argued that the finding of the learned Sessions Judge that there was delay in lodging the FIR is patently erroneous. In our opinion, the finding of the learned Judge that there was delay in lodging the FIR is not proper. The incident in question had taken place at about 12.0 noon. After the incident, the deceased and the complainant were taken in a bullock-cart to Village Mitral, and thereafter they had arranged for a tractor-trolley to take them to Vaso Hospital. Therefore, it would take some time in reaching Vaso Hospital, and accordingly they reached there at about 2.00 p.m. or 2.30 p.m. The complainant, after taking preliminary treatment had lodged the FIR at Vaso Police Station. Therefore, in our opinion, there is no delay in lodging the FIR.

10. The learned APP has argued that the incident had taken place in broad daylight and therefore, there was no question of mistaken identity of the accused by the complainant; that first in point of time, the complainant had lodged the FIR in which the names of the accused were disclosed and that the complainant himself was an injured witness as he had received injuries because of the dharia

blow given by accused no.4.

In our opinion, this argument has no merit. It is pertinent to note that the complainant is a resident of Village Piplata, which is 2 Kms. away from Village Mitral. The complainant in para 4 of his deposition in cross-examination admitted that he knew deceased Kantibhai Becharbhai, Arvind Gandabhai, and Harmanbhai Becharbhai as they were close friends. He admitted that except the above persons, he had no relations with other persons of Village Mitral, and he did not know the other residents of Village Mitral except the family members of Gandabhai Bhathibhai and Becharbhai Chuthabhai. This admission on the part of the complainant reveals that he did not know the accused persons and therefore, Becharbhai Chuthabhai, PW 8, ex. 32 has, in his cross-examination, rightly admitted that while they were on way to Vaso Hospital, they had deliberations as to who might be the assailants. This piece of evidence, as stated above, clearly shows that the complainant had given the names of the four accused after due deliberations with Becharbhai Chuthabhai, and Gandabhai Bhathibhai, who were highly interested witnesses and at the same time, they were inimical to the accused and their father Jivabhai Bhikhabhai, because father of respondents was making attempts to redeem the lands.

11. The statement of the complainant was recorded on the next day after the incident at about 7.0 a.m. or 7.30 a.m. At that time also he had not stated before police that he had snatched away the spade from accused no.2, and had wielded the same. The complainant has made so many improvements and exaggerations in his evidence before the Court as compared to what he had stated in the FIR and the further statements recorded by police during the course of investigation.

12. Witness Raiji Shanker is termed as 'chance witness' by the learned Addl. Sessions Judge. In our opinion, he cannot be even termed as 'chance witness', but he is a 'got up witness'. He has made many improvements during his deposition before the court. According to him, he had arrived at the scene of incident after hearing the shouts of complainant Fatesing. According to the complainant, he raised shouts after Kantibhai had fallen down. Thus, it becomes clear that witness Raiji Shanker had arrived at the place of incident after all the accused had allegedly given fatal blows to deceased Kantibhai. Inspite of this fact, Raiji Shanker has the audacity to say that he had seen the accused giving blows to Kantibhai by means of spades and

dharias. This witness, in paragraph 5 of his deposition during cross-examination has admitted that his father was a mortgagor of agricultural field bearing Survey No.514/2 which belonged to the father of the accused. Therefore, this witness is also interested one and inimical to the accused and their father Jivabhai Bhikhabhai. It is also pertinent to note that even though this witness claimed to be an eye-witness to the incident, he did not offer to make a statement before the police, and he had to be called by the son of Becharbhai Chuthabhai at the time of recording of the statements. This fact, the witness had to admit during his cross-examination. As stated earlier, the evidence of this witness is quite contrary to the evidence of injured eye-witness-cum-complainant Fatesing. His evidence about the manner in which blows by means of spades were given is also contrary. Therefore, in our opinion witness Raiji Shanker is a got up witness, and is not even a chance witness as observed by the learned Judge. He has come to help Becharbhai Chuthabhai who is the Sarpanch of Village Mitral. It is a settled legal position that implicit reliance cannot be placed on the testimony of deeply interested witnesses who have made material improvements during the course of their testimony, as compared to the prosecution story propounded at the investigation stage. As discussed above, the evidence of the four star witnesses of the prosecution creates doubt in our mind. Their presence at the scene of offence is also highly doubtful. The injuries sustained by complainant Fatesing were also very superfluous and they can be as well self-inflicted injuries. If the four accused were armed with deadly weapons like dharia and spades and were out to kill Kantibhai, they would not have spared complainant Fatesing and inflicted simple injuries. If dharia blow was given with its front curved blade portion on the head, then it would have caused multiple fracture of the skull. The medical certificate, exh.19 issued by Dr.Purani, PW 1 also goes contrary to the oral evidence of the complainant and eye-witness Raiji Shanker.

As we are in general agreement with the view expressed by the learned Addl.Sessions Judge, we do not think it necessary either to reiterate the evidence of the prosecution witnesses or to restate the reasons for acquittal given by the learned trial Judge, and in our view, the expression of general agreement with the view taken by the learned Judge would be sufficient in the facts and circumstances of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) GIRIJA NANDINI DEVI vs. BIGENDRA CHAUDHARI, AIR 1967 SC 1124, and (2) STATE OF KARNATAKA

vs. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents-accused, and the learned APP has failed to dislodge the reasons given by the learned Judge in order to convince us to take a view contrary to the one already taken by the learned Judge.

13. As a result of the foregoing discussion, we do not see any merit in the appeal. The appeal therefore, fails and is dismissed. Bail bonds executed by the respondents stand cancelled. Muddamal articles, are ordered to be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

abraham*